No. 78-425

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1978

P.C. PFEIFFER COMPANY, INC. AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Petitioners,

vs.

DIVERSON FORD AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR.

AYERS STEAMSHIP COMPANY AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Petitioners,

vs.

WILL BRYANT AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF CARGILL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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SUBJECT INDEX

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES (cont.)

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Pursuant to Rule 42(3) of the Supreme Court Rules, Cargill, Inc. respectfully moves for leave to file the attached Brief as Amicus Curiae in support of the Petitioners.

Counsel for all parties have orally consented to the filing of this Amicus Curiae Brief. The written consents required by Rule 42(2) have been prepared by all parties and mailed to counsel for Cargill, Inc. Delivery of the written consents has, however, been delayed by current weather conditions. All written consents will be submitted to the Clerk as soon as they have been received by Cargill, Inc.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS CURIAE CARGILL, INC.

Cargill, Inc. buys and sells grain. It is a grain merchant. Most of the grain sold by Cargill is exported overseas. Some of the grain sold by Cargill is transported to purchasers located within the United States.

The interest of Cargill, Inc. in this case arises from the fact that it is party to a case presently pending in this Court and presenting the same issue, namely, whether non-amphibious workers participating in shore-side cargo handling tasks which are not essential elements of vessel loading or unloading are engaged in maritime employment and therefore entitled to the benefits of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). Cargill, Inc. v. Powell, 573 F.2d 561 (9th Cir. 1977), petition

for cert. pending, No. 77-1543.

In Powell, the United States Court of Appeals for the Ninth Circuit concluded that claimant Powell was not entitled to the benefits of the LHWCA because (a) during nearly seven months of continuous employment with Cargill, Inc., claimant Powell neither performed nor was subject to assignment to "genuine maritime work", and (b) claimant Powell's continuous non-maritime employment with Cargill, Inc. foreclosed his claim that he continued to practice and to be entitled to the benefits due workers who continued to spend at least part of their working days in genuine maritime work.

Despite the Ninth Circuit's clear holding that nearly seven months of continuous non-maritime work removed claimant Powell from membership in the longshoring occupational group, the Federal

Respondent Director, Office of Workers' Compensation Programs, has continued to argue that Powell was a "longshoreman by trade", suggesting that Powell

> ". . . could be held to fall within the coverage of the Act on that basis alone, without the need to reach the question whether his activities in unloading grain from land transportation constituted 'longshoring operations' within the meaning of Section 2(3) of the Act." (Memorandum for the Federal Respondent on the Petition for Certiorari, p. 5)

Cargill, Inc. disputes the Federal Respondent Director's view that Powell remained a "longshoreman by trade" and suggests that the LHWCA entitlement of both Powell and Respondents Ford and Bryant requires this Court's determination of whether shore-side cargo handling activities by non-amphibious workers constitute "maritime employment" within the meaning of Section 2(3) of the LHWCA.

The resolution of this proceeding is of substantial importance to Cargill, Inc. and to the owners and operators of all other grain elevators located adjacent to the various navigable waters of the United States. The vast majority of the work performed at the elevators operated by Cargill and others is directed to the operation and maintenance of various types of grain handling equipment. The workers performing these tasks belong to many different labor organizations, including unions of teamsters, grain handlers, and longshoremen. While employed by Cargill, Inc., these workers--regardless of their union affiliation--do not assist directly in the loading of the vessels carrying the grain to overseas purchasers. All of those necessary direct vessel loading activities are performed by workers employed by independent contract stevedor-

ing companies.

Because all of the direct vessel loading operations at Cargill, Inc.'s elevators are performed by contract stevedoring companies, Cargill, Inc. was not historically subject to the pre-amendment LHWCA and, therefore, did not participate in the legislative process leading to the 1972 amendments. A determination that Respondents Ford and Bryant and Petitioner Powell are entitled to LHWCA benefits would have the effect of bringing within the ambit of the LHWCA an entire industry not even considered by Congress during its 1972 deliberations.

Through its participation in this proceeding, Cargill, Inc. seeks to persuade this Court to reject the Fifth Circuit Court of Appeals' analysis of the LHWCA coverage provisions, to prevent the unintended expansion of the LHWCA to the

grain handling industry, and to resolve the current coverage uncertainties by specifically ruling that LHWCA benefit entitlement does not extend to non-amphibious workers injured while engaged in shore-side cargo handling activities which, although performed at facilities adjoining navigable waters, are not essential elements of vessel loading or unloading.

SUMMARY OF ARGUMENT

LHWCA benefit entitlement extends to all persons "engaged in maritime employment" who sustain injury either upon the navigable waters of the United States or the several specified adjoining shore-side locations. (33 USC §§902(3) and 903(a))

Long standing precedent, the legislative intent underlying Congress' 1972 amendments, and this Court's decision in

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) all support the view that LHWCA coverage does not encompass non-amphibious workers engaged in shore-side cargo handling operations which, although part of the process of moving cargo between sea and land transportation, are not essential elements of loading or unloading vessels.

The determination of whether a particular employment is or is not "amphibious" should depend only upon the nature of the worker's activities while employed by the company upon whom he seeks to impose compensation liability. A prior "amphibious" occupation should not serve as the basis for imposing LHWCA liability upon employers who never employ workers in activities requiring at least partial performance on navigable waters.

ARGUMENT

Only Amphibious Workers Have A Potential Shore-Side LHWCA Benefit Entitlement[1]

The Federal Respondent Director advances the view that "maritime employment" --the LHWCA's prerequisite to both the employee's entitlement and the employer's exposure[2]--

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1/ Neither this proceeding nor Powell v. Cargill, Inc., supra, involves the compensability of injuries occurring during cargo handling activities which have moved ashore as a result of the advent of modern cargo handling techniques such as containerization and increased usage of LASH-type vessels. Ford, Bryant, and Powell were all injured during "old-fashioned" shore-side work. This brief deals only with the compensation entitlement of workers involved in these old-fashioned labors.

2/ 33 USC §902(3) defines "employee as "Any person engaged in maritime employment. . . ."

33 USC §902(4) defines "employer" as "An employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States. . . ."

> ". . . includes all physical tasks performed on the waterfront, and particularly those tasks necessary to the transfer of cargo between land and water transportation." (Memorandum for Federal Respondent on Petition for Writ of Certiorari, pp. 3, 4)

This view is contrary to decisions of this Court limiting "maritime employment" as used in the LHWCA to only that employment requiring at least partial performance on navigable waters. State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922); Nogueira v. New York, N.H. & H.R. Co., 281 U.S. 128 (1930); Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953).

In enacting the 1972 amendments, Congress clearly intended to invoke the traditional definition of "maritime employment".

> ". . . The Committee has no intention of extending coverage under the Act to individuals who

> are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." (S.Rep. No. 92-1125, 92d Cong., 2d Sess., 13; H.R.Rep. No. 92-1441, 92d Cong., 2d Sess., 11 (1972))

Recognition that Congress intended continued usage of the traditional "maritime employment" definition is implicit in this Court's decision in Northeast Marine Terminal Co. v. Caputo, supra, and the post-Caputo decisions issued by the United States Courts of Appeal for the Fourth and Ninth Circuits. The decision of the Fifth Circuit awarding LHWCA benefits to claimants Ford and Bryant stands alone in clearly rejecting the traditional "maritime employment" definition.3/

3/ There is strong indication that the

Northeast Marine Terminal Co. v. Caputo:

In reaching the decision that claimant Blundo (the checker of containerized

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Ford/Bryant decision does not represent the unanimous view of even the Fifth Circuit Court of Appeals. In Thibodeaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978), a decision issued subsequent the one here at issue, Circuit Judges Clark, Fay, and Vance were required to determine the LHWCA eligibility of a deceased oilfield construction and maintenance worker. In affirming the trial court's summary judgment against the decedent's widow, the Court noted that

> ". . . as a matter of law the deceased was not engaged in 'maritime employment' as measured by the alternative tests of status sanctioned in Caputo. There is no substantial evidence that the deceased spent at least part of his time 'indisputably' as a longshoreman, harbor worker, ship repairman, ship builder, or ship breaker. . . . The deceased simply is not the amphibious worker sought to be protected by the 1972 amendments to the LHWCA because his work was performed on land. . . ." (580 F.2d 841, at 845; emphasis added.)

cargo) was entitled to LHWCA benefits, this Court concluded that the LHWCA "status" test was met because Blundo's work was

> ". . . clearly an integral part of the unloading process as altered by the advent of containerization." (432 U.S. 249, 271)4/

In considering claimant Caputo's "status", however, this Court did not conclude that Caputo's work--the loading of goods already unloaded from a ship into a delivery truck--fell into the "maritime employment" category. Rather, look-

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4/ Once again, this proceeding does not involve claims to LHWCA benefits by workers subject to what this Court identified as the first "dominant theme" underlying the 1972 amendments, i.e.,

> ". . . Congress' decision to extend the coverage shoreward. . . [in] recognition that the 'advent of modern cargo-handling techniques' had moved much of the longshoremen's work off the vessel and onto the land." (432 U.S. 249, 269-70)

ing to the second "dominant theme" underlying the 1972 amendments, this Court extended LHWCA benefit entitlement to Caputo because, although his "moment-of-injury" work was non-maritime, the range of potential jobs to which he could have been assigned while employed by Northeast Marine Terminal included the clearly maritime work of loading and unloading vessels. (432 U.S. at 274) Because of that potential job assignment range, a determination that Caputo's truck-loading activities were not covered by the LHWCA would

> ". . . exclude him from the Act's coverage in the morning but include him in the afternoon . . . [and] . . . revitalize the shifting and fortuitous coverage that Congress intended to eliminate." (432 U.S. at 274)

This potential revitalization of a "shifting and fortuitous coverage" would have thwarted Congress' clear intent

> ". . . to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would have been covered only for part of their activity." (432 U.S. at 273)

In short, Caputo received LHCWA benefits because he was "amphibious" and despite the implicit finding that the work being performed by him at the time of his injury was non-maritime.

Post-Caputo Decisions Of The United States Courts of Appeal:

In Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), coverage was afforded because the employer conceded that claimant Herron was engaged in shipboard longshoring activities during at least a portion of his working day, and because the Benefits Review Board's conclusion that a gearlockerman's function[5/] was an integral part of

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5/ Gearlockermen work on a daily basis, responsible for repairing, maintaining,

longshoring operations and therefore "maritime employment" was

> ". . . supported by evidence in the record that Herron was required at times to work aboard ships and even in the hold at tasks directly related to loading and unloading cargo." (568 F.2d at 140)

The findings implicit in Herron: (a) Shore-side work incidental to actual loading and unloading activities is not "maritime employment"; and (b) An injury sustained by a person performing such incidental work is covered under the LHWCA only if the worker himself at times works aboard ship and is, therefore, amphibious.

The conclusions implicit in Herron became express in the Ninth Circuit's subsequent decision in Powell v. Cargill,

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refueling, and inspecting the equipment housed in the stevedore's gearlocker, and for transporting that equipment between the locker and the pier. (568 F.2d at 139)

Inc., supra.

Powell was injured while unloading an incoming rail car bringing grain to Cargill's waterfront export facility. In denying his claim to LHWCA benefits, the Ninth Circuit first found Powell's "moment-of-injury" work to be non-maritime,6/ and

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6/ ". . . In the past it might have been customary for Powell to hire himself out to employers on an irregular basis, and some of his work may have been indisputably maritime. At the time of the accident, however, Powell had been employed by the same employer performing the same duties for about seven months. Not once during that tenure was he called on to assist directly in the loading or unloading of any ship, nor is there any evidence that such genuine maritime work was even contemplated. Powell's attention was directed to the unloading of rail cars as they arrived at the elevator. He had no involvement whatsoever with the loading and unloading of the ships themselves. His work was more oriented to the rails than to the sea." (573 F.2d at 564)

then determined that coverage was not nevertheless present because Powell was not amphibious.

> "The policy pointed to by the Supreme Court in Northeast Marine Terminal to explain Congress' extension of the Act to employees who spend a part of their working day in non-maritime activity cannot support coverage for Powell. Having served seven months of continuous, non-maritime employment, with no indication that termination of that employment was contemplated, Powell cannot now claim that he was subject to the 'shifting and fortuitous coverage' in a single workday that concerned the Supreme Court in Northeast Marine Terminal." (573 F.2d at 564)

In Conti v. Norfolk & W. Ry. Co., 566 F.2d 890 (4th Cir. 1977), the LHWCA "status" issue arose when the employer, against whom three injured workers sought Federal Employers Liability Act damages, argued that the LHWCA provided the workers' exclusive remedy.

The Fourth Circuit rejected the employer's defense, finding that

(a) Shore-side tasks essential to the transfer of cargo from land to water transportation were not "maritime employment" (566 F.2d at 895); and

(b) Workers engaged in non-maritime cargo handling activities are entitled to LHWCA protection only if they are amphibious, i.e., only if they spend at least some of their time in activities which would have been covered under the pre-amendment Act. (566 F.2d at 895)

The Fourth Circuit's reading of the LHWCA and Caputo is in complete accord with the views of the Ninth Circuit and the arguments here advanced by Amicus.

> "To us the nub of the Court's decision is that an employee who is not engaged in 'an integral part of the unloading process' will not fall within the coverage of the Act unless his occupation is of a traditional mari-

time nature. This was the construction placed upon the statutory language by the Ninth Circuit in Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (1976), cert.denied 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976):

> 'We hold that for an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to "traditional maritime activities involving navigation and commerce on navigable waters," with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in §903 [citations omitted].'

"It is clear that in the cases before us the occupations of the plaintiffs were not of a traditionally maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lambert's Point, and the sophisticated automation of the facilities

> at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel. We find nothing in the Amendments or the legislative history to indicate that under these circumstances the Congress intended to transfer the redress of such injured railroad workers from the FELA to the Longshoremen's Act.
>
> "Since we agree with the District Court that the plaintiffs were not engaged in maritime employment at the time of their injuries, the judgments are affirmed." (566 F.2d at 895) 7/

The careful analyses of Caputo provided by the United States Courts of Appeal for the Fourth, Fifth and Ninth Circuits in Conti, Thibodeaux, Herron, and

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7/ The Conti decision seriously undermines the continuing vitality of the Fourth Circuit's earlier decision in I.T.O. Corp. v. Benefits Review Board, 542 F.2d 903 (4th Cir. 1976) (en banc), vacated and remanded in part sub.nom. Adkins v. I.T.O. Corp., 433 U.S. 904, on remand, 563 F.2d 646 (4th Cir. 1977), holding that a worker engaged in loading a truck with previously containerized cargo was entitled to LHWCA benefits.

Powell, fully comply with the requirement that the LHWCA

> ". . . be liberally construed in conformance with its purposes, and in a way which avoids harsh and incongruous results." (Voris v. Eikel, 346 U.S. 328, 333 (1953)

and with the purposes underlying the 1972 amendments.

The Fifth Circuit's award of benefits to non-amphibious shore-side cargo handlers must be reversed unless the 1972 amendments are to ensnare literally hundreds of employers, such as Amicus, who conduct no shipboard activities and who, therefore, played no role in and receive no benefits from the 1972 legislative process.

Amicus urges this Court to specifically rule that workers engaged in shore-side cargo handling activities which are

not "essential elements"[8] of unloading or loading a vessel are entitled to LHWCA protection only if they are "amphibious".

A Worker Is "Amphibious" Only If The Potential Range Of Job Assignments In The Employment Followed By The Worker At The Time Of Injury Requires At Least Some Work On Navigable Waters

The Federal Respondent Director seeks to characterize as "amphibious" any worker who has historically worked aboard ships in loading or unloading operations, even if that work was performed for an employer other than the one upon whom the worker seeks to impose LHWCA liability.[9]

8/ In Caputo, this Court noted that the "essential elements" of vessel unloading included (a) taking cargo out of the hold, (b) moving it away from the ship's side, and (c) carrying it immediately to a storage or holding area. (432 U.S. at 267)

9/ This attempt is clear from the Federal Respondent Director's repeated characterization of claimant Powell as a "longshoreman by trade" despite the Ninth Circuit's clear conclusion that nearly

In short, the Federal Respondent Director seeks to call "amphibious" any worker who, during the long span of a working career, has been involved in shipboard activities.

The Ninth Circuit properly and specifically rejected this approach in deciding that claimant Powell was not amphibious:

> ". . . Similarly, it is not relevant that Powell is a registered member of the International Longshoremen's and Warehousemen's Union, or that he worked in virtually all phases of the longshoring operation for every employer in the Port of Portland. We cannot concern ourselves with the entire span of a claimant's career." (573 F.2d at 563, Fn. 2)

This Court found claimant Caputo "amphibious" because he was subject to shipboard assignment on the day of his injury and during the course of his employ-

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seven months of continuous employment as a shore-side grain handler foreclosed Powell's attempt to claim benefits payable to others who remained in the "longshore" trade and continued to face shipboard hazards on a regular basis.

ment with Northeast Marine Terminal Co. (432 U.S. at 273-74)

The Ninth Circuit found Powell to be not "amphibious" because he was never subject to such assignments during seven months of employment with Cargill, Inc.

No court has yet decided the period of a worker's career which should be scrutinized when deciding whether he is or is not amphibious.

> "This is not to say that an employee whose duties shifted from the maritime to the non-maritime over a period of time greater than a single workday is never covered by the LHWCA. We only note that in Northeast Marine Terminal, supra, the Supreme Court focused on an employee whose duties shifted throughout a single working day. We do not decide whether an employee whose duties shifted every week, or every month, may still qualify under the Act. That determination must be left to development in future cases." (573 F.2d at 564, Fn. 4)

Whatever specific period of time is developed in future cases, Amicus urges

this Court to specifically limit the permissible scrutiny to the period of the worker's current employment with the employer upon whom he seeks to impose LHWCA liability.

In cases involving persons employed by an individual employer for continuous periods greater than a single workday, the permissible scrutiny might well extend for the entire employment period. In cases involving daily or single-job hiring--a sizeable proportion of waterfront work--the scrutiny should be limited to the specific day or job.

The fundamental prerequisite of all workers' compensation systems, including the LHWCA, is that compensation entitlement and liability arise only in cases of accidental injury or death "arising out of and in the course of employment." (33 USC §902(2)) The fact that the "em-

ployment" out of which the injury or death must arise is that with the employer upon whom the employee seeks to impose compensation liability is equally fundamental.

> "Compensation law, however, is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the right to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee's status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common law damages." (Larson, The Law of Workmen's Compensation, Vol. IB, §47.10, pp.8-147, 148 (1978))

The broadening of the permissible scrutiny period suggested by the Federal Respondent Director beyond the worker's current employment would violate these

basic premises of workers' compensation law and would prevent any employer's accurate assessment of his own compensation risks. If the Federal Respondent Director's position is adopted by this Court, a worker's characterization as "amphibious" and hence his entitlement to LHWCA benefits for injuries sustained during non-maritime work would be wholly dependent upon the worker's former employments and would, therefore, create wholly "fortuitous" benefit disparities among persons performing the same work for the same employer.

In cases such as Powell, involving workers belonging to expanding labor organizations, compensation liability of employers in the area to which the union's jurisdiction has expanded would depend upon the worker's activities with former employers and would, therefore, make the

LHWCA dependent upon those same vagaries of union jurisdiction which this Court has stated to be unrelated to the purposes of the LHWCA. (432 U.S. at 269, Fn. 30)

CONCLUSION

Amicus urges this Court to reject the Fifth Circuit's approach and to conclude that the LHWCA affords protection for shore-side injuries to persons engaged in old-fashioned cargo handling activities only if (a) the activities are "essential elements" of the vessel loading or unloading process, or (b) the activities are performed by workers whose current employment is amphibious.

The position advanced by the Federal Respondent Director and in large part adopted by the Fifth Circuit goes far beyond Caputo and the history underlying the 1972 amendments.

Acceptance of the Federal Respondent

Director's position would extend the LHWCA's coverage to all cargo handling work performed within the Act's "situs" requirements, would effectively erase the "status" requirement incorporated into the LHWCA in 1972, and would bring within the LHWCA's reach many industries, including that represented by Amicus, having none of that "genuinely salty flavor"[9/] long thought necessary to be considered "maritime".

Respectfully submitted,

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9/ Kossick v.United Fruit Co., 365 U.S. 731 (1961).

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 1979, I served three true and correct copies of the MOTION FOR LEAVE TO FILE AND BRIEF OF CARGILL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS on:

E.D. VICKERY
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by placing said copies in sealed envelopes addressed as above shown; said envelopes were then deposited in the

United States Post Office at Portland, Oregon, on the day last above mentioned, with the postage thereon fully paid.

ROBERT BABCOCK
Of Attorneys for Amicus Curiae
Cargill, Inc.